LIBRARY
SUPREME COURT, U.S.

No. 517

Office-Supreme Court, U.S.
FILED
SEP 1 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

GEORGE G. HUNTER, JR.,

Petitioner,

—v.—

FRANCIS S. TALBOT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE G. HUNTER, JR.
Petitioner Pro Se
51 Broadway
New York, N. Y. 10006

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	4
Statement	5
Reasons for Granting the Writ	12
Conclusion	21
Appendix A:	
Constitutional Provisions, Statutes and Regulations Involved	1a
Appendix B:	
Opinions and Judgments Below	8a

Table of Cases & Other Authorities Cited

Cases:

Barr v. Matteo, 360 U. S. 564	3, 4, 12, 13, 19, 20, 21
Hughes v. Johnson, 305 F. 2d 67	13
People v. Rudolph, 303 N. Y. 73	19

PAGE

Poss v. Lieberman, 299 F. 2d 358 12

Saunders v. Shaw, 244 U. S. 317 ..... 15, 16

United States v. Deaver, 14 F. 595 20

Wheeldin v. Wheeler, 373 U. S. 647 13

Constitutional Provisions:

United States Constitution:

Fifth Amendment 3, 4

Seventh Amendment 3, 4, 16

New York State Constitution:

Article 1, Section 2, of the Constitution of the State of New York 3, 4

Statutes:

Internal Revenue Code:

Section 6301 4

Section 6331 4

Section 7214 ..... 2, 4, 5, 19

New York Penal Law:

Section 854 4

United States Code:

28 U. S. C. §1446 6

28 U. S. C. §1254(1) 2

Miscellaneous: PAGE

Federal Register:

26 Fed. Register 6372-6395

Par. 1118 4

Par. 1118.1 4

Par. 1118.2 ..... 4, 21

Par. 1118.5 4

Par. 1118.8 ..... 4, 9

Federal Rules of Civil Procedure:

Rule 12(b)(6) 2, 7

Moore, Federal Practice (2 ed. 1964):

Vol. 2, ¶12.08 at 2245 ..... 12, 18

Prosser on Torts, 2nd ed. (1955):

Sec. 95, p. 612 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

GEORGE G. HUNTER, JR.,

Petitioner,

—v.—

FRANCIS S. TALBOT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, George G. Hunter, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 18, 1965, affirming a judgment of United States District Court, Southern District of New York.

Citations to Opinions Below

Four memorandum opinions were rendered by the District Court and they are unreported (R. 1, pp. 3a-10a).* They are printed in Appendix B hereto, *infra,* pp. 13a-21a. The opinion of the United States Court of Appeals (R. 2,

* The reference "R. 1" is to Volume I of the record printed below and the proceedings in the United States Court of Appeals, Second Circuit as certified by the Clerk of that Court. The reference "R. 2" is to Volume II of the same.

pp. 13a-15a), printed in Appendix B hereto, *infra,* pp. 8a-11a is reported in 345 Fed. 2d 513.

Jurisdiction

The judgment of the United States Court of Appeals was entered on May 18, 1965 (R. 2, pp. 16a-17a; Appendix B, *infra* p. 12a). Rehearing was denied on June 7, 1965 (R. 2, pp. 30a-33a). Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

Petitioner sued respondent, a revenue officer, in tort for seizing his property. The allegations go much further than just malicious seizure. Petitioner alleges that respondent was completely and utterly without authority for the reason that he was violating the criminal prohibitions of the Internal Revenue Code itself (§7214—Willful Oppression). Petitioner demanded a jury trial. The District Court, upon a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure elected on its own motion to treat it as a motion for summary judgment but expressly limited consideration to the narrow question of respondent's authority. Documents were submitted which contained evidence that whatever authority respondent had he had obtained by fraud by means of a deliberately false report to his supervisor attributing a broken promise to petitioner and that even that authority was revoked before it was acted upon. The District Court dismissed the complaint upon the ground that respondent had "requisite authority." Upon appeal the United States Court of Appeals affirmed but it affirmed upon an entirely different ground,

namely, upon its own independent finding of fact that respondent had not acted maliciously. It did not rule on any other question of law or fact. Upon a petition for a rehearing petitioner called to the attention of the Court of Appeals that he had been precluded by the District Court from presenting any evidence on the question of malice and that he had duly demanded a jury trial. A rehearing was denied. The following questions are presented:

1. Did the Court of Appeals deny petitioner due process contrary to the Fifth Amendment when it made a finding of fact that there was no malice after the lower court had precluded petitioner from presenting his evidence of it?

2. Did the Court of Appeals deny petitioner a jury trial contrary to the Seventh Amendment to the Constitution of the United States and Article 1, Section 2, of the Constitution of the State of New York by making a finding of fact that there was no malice?

3. Did the Court of Appeals in making the aforesaid finding of fact rely on reasons so specious that it committed a gross abuse of discretion?

4. Does the cloak of immunity under *Barr* v. *Matteo*, 360 U. S. 564, extend beyond executives and others with discretion and cover subordinates who are neither required nor permitted to exercise discretion but merely take and execute orders?

5. Does the doctrine of *Barr* v. *Matteo, supra,* clothe a revenue officer with immunity while he performs acts declared criminal by the Internal Revenue Code itself?

6. Does the doctrine of *Barr* v. *Matteo, supra,* clothe a revenue officer with immunity when he obtains authority by means of a deliberately false report to his superior officer whether or not it is revoked before he acts?

7. Was it error to hold that there was no theory other than one involving malice which could support petitioner's case for the reason that there would be liability for seizing property without authority regardless of malice?

8. Did the courts below err or abuse their discretion in denying petitioner the right to take depositions?

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the Fifth and Seventh Amendments to the Constitution of the United States and Article 1, Section 2 of the Constitution of the State of New York.

The Statutory provisions involved are the Internal Revenue Code (1954), Sections 6301, 6331, and 7214, and the New York Penal Law, Section 854.

The regulations involved are Treasury Regulations §301.6331 (1954 Code), §301.7701-9(a) and (c) and "Statement of Organization and Functions of Internal Revenue Service," 26 Fed. Reg. 6372-6395 (1961), paragraphs 1118, 1118.1, 1118.2, 1118.5 and 1118.8.

The aforesaid constitutional and statutory provisions and regulations are printed in Appendix A, *infra,* pp. 1a-7a.

Statement

Petitioner, a taxpayer, brought this tort action against respondent, a revenue officer employed by Internal Revenue Service for malicious and illegal seizure of his property (R. 1, pp. 13a-17a). He charges more than ordinary malicious seizure (R. 1, pp. 21a-22a). He alleges that respondent was engaged in criminal activity in violation of the very statute under which he worked (Internal Revenue Code, §7214—Willful Oppression) and by reason of those criminal acts he was completely and absolutely without authority (R. 1, pp. 21a-22a). Petitioner, an attorney, alleges that respondent by such seizure closed out his accounts at a bank that had referred clients to him and where he had maintained an account for over 21 years (R. 1, pp. 19a-22a). The amount seized was not large (R. 1, p. 20a). On the contrary, it was very small and petitioner alleges that respondent knew or should have known there was only a token balance but that he was acting solely to harass and injure petitioner with no idea whatever of collecting any tax (R. 1, p. 20a).*

---

* Petitioner in his amended complaint alleges that respondent acted in retaliation of petitioner's sharp rebuke for grossly unfair collection tactics (R. 1, pp. 14a-17a). More particularly, petitioner, an attorney, alleges therein that upon returning to his office in 1962 after a serious illness, paying $1500 on account of $3411 due on 1960 income taxes, having overpaid his 1961 taxes, arranging to pay the balance in a manner declared satisfactory by respondent, and promising to submit financial statements within 30 days, respondent flatly and unequivocally refused petitioner more than 10 days to prepare such financial statements (R. 1, pp. 13a-15a). Those statements had to cover not only petitioner's personal finances but the details of his law practice and in addition thereto the personal finances of his wife (R. 1, pp. 13a-15a). Petitioner alleges he told respondent that he was not going to drop everything to prepare statements in 10 days but he would file them within 30 days (R. 1,

This action was commenced in Civil Court of the City of New York, New York County (T.R. pp. 1-13).* Respondent removed it to the United States District Court, Southern District of New York, pursuant to 28 U. S. C. §1446 (T.R. pp. 1-13).

The gravamen of the complaint is that respondent acted both maliciously and without authority. Although the Court of Appeals disposed of the case upon the ground there was no malice, petitioner had been precluded from presenting his evidence of malice. The first curtailment arose out of an early motion by respondent for summary judgment or, in the alternative, to dismiss the complaint pursuant to Rule 12(b)(6) (T.R. pp. 15-34). Upon a prompt notice by petitioner of the examination before trial of respondent in aid of his opposition to said motion, the District Court gave respondent the choice of withdrawing that part of his motion which was for summary judgment or permitting petitioner to examine him (T.R. pp. 51-58, 81-83, 144). Respondent chose the former and an order was entered effecting such withdrawal (T.R. pp. 81-82, 144). That foreclosed the submission of proof of malice. And it was again and permanently foreclosed by a subsequent ruling noted below.

The District Court dismissed that original complaint but with leave to petitioner to replead so as to properly allege respondent's lack of authority (R. 1, pp. 11a-12a).

---

p. 15a). And, he alleges, he sharply rebuked respondent for such gross unfairness and oppressive tactics and abruptly hung up the telephone on him (R. 1, pp. 14a-15a). In short, it is claimed that respondent acted solely to hurt and humiliate petitioner for defying his unconscionable demands. Petitioner did pay the balance as promised (R. 1, p. 22a).

* The reference "T.R." is to the original typewritten record certified by the Clerk of the United States Court of Appeals and submitted herewith in addition to the parts of the record printed below.

Petitioner did replead (R. 1, pp. 13a-27a). Respondent then moved to dismiss pursuant to Rule 12(b)(6) *but this time very carefully avoided any request for summary judgment* (T.R. p. 122). At that point, however, the court of its own motion elected to treat the motion as one for summary judgment (R. 1, p. 7a; Appendix B *infra* p. 17a). But the court *explicitly limited the scope* to proof and consideration of the *authority* of respondent (R. 1, p. 7a; Appendix B *infra* p. 17a). Specifically the court stated in a memorandum opinion dated October 1, 1963:

> " * * * Consideration of the motion will be confined to the question of whether the aforesaid authority was subdelegated to defendant. The parties may submit pertinent affidavits and documents on or before October 18, 1963" (R. 1, p. 7a; Appendix B *infra* p. 17a).

That ruling finally and conclusively precluded any consideration by District Court of the merits of the case, and, of course, left petitioner without any opportunity whatever to present his evidence of respondent's malice.

In response to the above quoted invitation to produce "pertinent affidavits and documents" regarding respondent's authority or lack of it petitioner produced Internal Revenue Service's "TDA History Record" of his case (R. 1, pp. 33a, 35a). That is a day to day record of the case in the handwriting of respondent and of his supervisor. It is set out in full in the record in photo-offset form (R. 1, pp. 33a-35a). Set forth together with it and in full is respondent's affidavit which he had submitted on the aforementioned motion for summary judgment that he had been forced to withdraw (R. 1, pp. 28a-32a). Those documents were submitted to prove that whatever authority respon-

dent had he had obtained by his own purposely and consciously false report to his supervisor that petitioner had promised financial statements within 10 days and that he had broken his promise; and that even that authority was revoked before he acted. That written report in petitioner's own hand states flatly that petitioner had made that promise (R. 1, p. 33a). Specifically he said:

> "* * * Taxpayer stated that he is unable to pay more at this time and would complete F/S & return in 10 days if mailed to him. 433 AB's mailed" (R. 1, p. 33a).

Immediately following that entry and in the supervisor's handwriting is this direction:

> "JJL In view of failure of TP to furnish financial Statement—it is incumbent upon you to file Levy with Bank" (R. 1, p. 33a).

But before he could levy the statements arrived and upon respondent's report of the arrival the supervisor made a new and superseding order to serve a "Notice before Levy" on petitioner instead (R. 1, p. 33a). That last order never was changed or supplemented (R. 1, pp. 33a-35a). Then 15 days later respondent went ahead anyhow and seized the account (R. 1, p. 35a).

The affidavit of respondent referred to above constitutes compelling if not conclusive proof that respondent made that false report deliberately and with full consciousness that it was flagrantly false. That affidavit was made by respondent nearly a year later and in it he vividly recalled that petitioner "got excited" and "told me in effect that I would get them whenever he decided to send them" (R. 1, p. 30a). Actually the amended complaint states that petitioner refused to promise them in 10 days but did promise them within 30 days and that he did furnish them within 30 days (R. 1, pp. 13a-15a).

Thus there is clear documentary proof that whatever authority respondent ever had he obtained by deliberate fraud, and that same document would support a jury verdict that even that authority was revoked before he used it.

Upon that motion petitioner also submitted, as bearing directly upon the lack of authority, a document which respondent concedes to be the only formal delegation of authority which applies to Revenue Officers GS-9, such as himself, of which there are about 450 in Brooklyn and Manhattan alone (T.R. pp. 172-190). That delegation reads:

> "Pursuant to the authority vested in the District Director by the Treasury Decision No. 6119, Sections * * * ; Revenue Officers, GS-9 are hereby authorized to sign their name on behalf of the District Director on Forms 668A * * * " (R. 1, pp. 41a-42a).

That paper plainly involves only the mechanical signing of notices. Without it the District Director would have to sign thousands of notices of levy daily. It has nothing whatever to do with the fixing of responsibility in some responsible official to decide in the first place when to issue the process. Nevertheless that is the document the District Court relied upon in finding that respondent had "requisite authority" (R. 1, p. 10a; Appendix B, *infra* p. 20a).

For the delegation of that responsibility see "Statement of Organization and Functions of the Internal Revenue Service, 26 Fed. Reg. 6372-6395 (1961) at par. 1118.8:

> "LOCAL OFFICES
>
> * * * * * * *
>
> (2) * * * Technical supervision of the personnel at a local office is the responsibility of the group supervisor or group supervisors of whatever group or

groups the employees are members" (Appendix A, *infra* p. 7a).

And there are other official documents in the record which reflect a question of fact as to whether respondent had any discretion whatever regarding seizures. Those official documents are "Position Descriptions" which are prepared for Civil Service. One set covers Revenue Officers GS-9, such as respondent, and another covers Revenue Officers GS-12, supervisors such as respondent's supervisor (R. 1, pp. 36a-40a; R. 2, pp. 1a-5a). Those documents are not delegations of authority but reports attempting to define the duties of the persons holding the respective positions. These "Position Descriptions" settle nothing, but they do raise genuine questions of fact as to respondent's lack of authority. For instance the "Position Descriptions" for Group Supervisor—GS-12, including respondent's supervisor, states that he directs revenue officers in "such collection activities as the filing of tax liens; the service of levies; seizure and sale of real and personal property; * * *" (R. 1, p. 37a).

Petitioner applied for permission to take depositions to discover the bureau's usual course of business which could answer those questions of authority raised by the position descriptions but he was denied the opportunity (R. 1, pp. 8a-9a; T.R. pp. 140-151, Appendix B, *infra* p. 19a). The District Court said:

"* * * Moreover, the issue before the court at this time is one which can be determined upon affidavits and documents alone" (R. 1, p. 9a; Appendix B, *infra* p. 19a).

The District Court dismissed the amended complaint upon the ground that the aforesaid delegation of the District Director which merely authorized an agent "to sign his name," satisfied the court that respondent had "the requisite authority" (R. 1, p. 10a).* And, the District Court added:

> "• • • The other contentions made by plaintiff have been disposed of on prior applications" (R. 1, p. 10a; Appendix B, *infra* p. 20a).

That statement is grossly inaccurate. Plaintiff contended that respondent got whatever authority he had by fraud by the aforesaid false report and furthermore that his supervisor had revoked even that before he seized the account (T.R. pp. 158-171). That never was decided. It was not even mentioned (R. 1, pp. 3a-10a; Appendix B, *infra* pp. 13a-21a). In fact the evidence was not discovered or produced prior to that final application and could not have been disposed of earlier (T.R. pp. 172-190).

Upon appeal the United States Court of Appeals held the case for 7 full months. It was argued October 16, 1964, and was not decided until May 18, 1965. The court then summarily disposed of it as being "clearly without merit" by reason of the alleged fact that respondent had not acted maliciously, a factor expressly precluded from consideration by the District Court. Said the Court of Appeals:

> "These allegations by plaintiff belie the theory of his suit against defendant. If defendant was bent on 'harassing and injuring' plaintiff, he would not, by any

---

* The opinion of the District Court speaks about "a chain of delegation" (R. 1, p. 10a; Appendix B, *infra* p. 20a). And respondent printed a prior delegation in the appendix to his brief (R. 2, p. 8a). All of those delegations, except the one cited in this petition, had been superseded and are of no effect whatever. The only delegation then in effect was the one found in R. 1, pp. 41a-42a.

reasonable stretch of the imagination, wait four weeks for plaintiff's financial statements, send plaintiff a new and superfluous ten day warning, wait another fifteen days, and then levy only on the bank accounts in Manhattan. To our knowledge, there being no other theory on which the suit could be based, we hold that plaintiff's claim was 'clearly without any merit' and was properly dismissed. 2 Moore, Federal Practice ¶12.08, at 2245 (2 ed. 1964). We need not reach defendant's alternative argument that he was immune from suit, within the principles of *Barr* v. *Matteo,* 360 U. S. 564 (1959) and like cases" (Appendix B, *infra* pp. 10a-11a).

Petitioner immediately petitioned for a rehearing, pointing out that the court had disposed of the case on the merits after he had been precluded by prior determinations from presenting his evidence on the merits or even being heard, and furthermore, that he had demanded a jury trial (R. 2, pp. 18a-29a). The petition for a rehearing nevertheless was denied (R. 2, pp. 30a-33a).

Reasons for Granting the Writ

The decision of this Court in *Barr* v. *Matteo, supra,* decided the question of civil immunity on the part of governmental officials with executive status and with the responsibility of exercising discretion. And although the scope of that decision seems clearly enough to be restricted to executives or persons who must exercise discretion, there is actually much confusion about it. That confusion is referred to as "uncertainty" by the Court of Appeals, Second Circuit in *Poss* v. *Liebermann* (1962), 299 F. 2d 358, cert. denied 370 U. S. 944, as follows:

"There has been some uncertainty among scholars as to the reach of absolute privilege to the lower echelons of administrative employees. Cf. Prosser on Torts, 2nd ed. (1955), Sec. 95, p. 612. While the language of the recent cases indicates an unlimited reach to the privilege, it may be possible that a case involving such an administrative employee at a minor grade might lead to a re-examination of the language. * * * *"

That case was decided on another point.

In fact that uncertainty was brought to the attention of this Court in *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963) where the lower court had relied upon *Barr* v. *Matteo*. This Court corrected a misapprehension there by saying that "respondent Wheeler was not acting sufficiently within the scope of this authority to bring the doctrine into play." But neither that case nor any other case has provided a yardstick to determine the limits of the doctrine.

And there is a conflict in principle between the law as it now stands in the instant case and a Court of Appeals, Ninth Circuit, decision, *Hughes* v. *Johnson*, 305 F. 2d 67 (1962). There plaintiff, who maintained cold storage facilities for game birds, brought suit against Federal game wardens for seizure of the game. The District Court dismissed the complaint which was not too clear as to its theory. Reversing, the Court of Appeals had this to say about the application of the rule of *Barr* v. *Matteo*:

"BARR v. MATTEO was concerned with an officer's liability for injury resulting from the performance of acts *within the scope of official duties*, when such performance was actuated by malice. For reasons of public policy, the

> officer was held immune from suit under these circumstances. Our problem at this point does not relate to the malicious performance of official duties. The question is whether a search without a warrant and unsupported by arrest, in violation of the Fourth Amendment of the United States Constitution, can be said to fall within the scope of the official duties of these appellees. In our view it cannot, and accordingly immunity does not extend to such conduct." (Italics in original.)

Does it take a violation of the Constitution to remove illegal conduct from the scope of authority of a Revenue Officer? There does not seem to be any rational legal difference between a game warden violating the Constitution and a revenue officer violating the criminal prohibitions of the very statute under which he operates.

It is submitted that the instant cases raises clear-cut issues which, if decided by this Court, would go very far in clarifying this unsettled area. For instance: (1) Does a minor employee without executive authority and without any discretion or duty to exercise discretion have immunity? (2) Does a revenue officer have immunity while performing acts declared criminal by the Internal Revenue Code itself? (3) Does a Federal employee have immunity when he obtains his authority by fraud or other dishonest means?

And, of course, the instant case presents serious questions of due process and the right to trial by jury.

Those are general statements. More specific comments follow.

1. In finding *as a fact* that there was no malice after the District Court had *precluded* petitioner from proving that there was, the Court of Appeals has clearly denied petitioner due process. Furthermore it is in direct conflict with *Saunders* v. *Shaw,* 244 U. S. 317 (1917), a case which is indistinguishable. In *Saunders* v. *Shaw* the appellate court, the Supreme Court of Louisiana, had decided the case upon matters printed in the record but which had been excluded from evidence in the lower court. By reason of that the aggrieved party had had no opportunity to offer his proof to rebut it. Mr. Justice Holmes said:

> "* * * He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence * * *"

The Court reversed the judgment for that precise reason. There, as here, the question of due process was raised for the first time in a petition for rehearing because the question had not presented itself before.

In his petition for rehearing petitioner called to the attention of the Court of Appeals the rulings in the District Court precluding his proof; called attention to *Saunders* v. *Shaw, supra;* and represented to the court that he did, in fact, have evidence of malice (R. 2, pp. 18a-29a).* Thus, in

---

* Actually there was compelling evidence of malice in the record anyhow. Respondent's false report to his supervisor that petitioner promised financial statements and then broke his promise was a deliberately false and malicious attack on petitioner's integrity, a vital matter in any collection situation (R. 1, pp. 28a-35a). Petitioner pointed that out to the Court of Appeals in his petition for a rehearing but it was completely ignored (R. 2, p. 27a). The affirmative finding by the Court of Appeals that there was no malice not only denies due process but, in light of the evidence that is in the record, defies explanation.

denying the rehearing, the Court of Appeals flatly refused to follow *Saunders* v. *Shaw*.

This is a flagrant case of denial of due process by a high court. It is submitted that such a situation is intolerable and it calls for this Court to exercise its power of supervision.

2. In finding *as a fact* that there was no malice, the Court of Appeals also denied petitioner a jury trial contrary to the guarantee of the Seventh Amendment as well as the Constitution of the State of New York. Petitioner had duly demanded a jury trial (T.R. p. 14).

There being clear evidence of malice in the record anyhow, namely, respondent's false report that petitioner had made and had broken a promise, to reject that evidence and to say malice does *not* exist, is the clearest conceivable encroachment upon the province of the jury. And, of course, completely aside from that, petitioner alleged malice in his amended complaint (R. 1, pp. 14a-22a). It is for the jury and not for the court to pass upon the evidence now in the record and such additional proof of malice as petitioner would present upon trial.

The denial of a jury trial, like the denial of due process, is so flagrant a denial of fundamental rights that it is submitted that it alone should impel this Court to exercise its power of supervision.

3. An integral part of the court's denial of due process and jury trial, but really demanding separate attention, are the reasons given by the Court of Appeals for its conclusion that there was no malice. The court states:

> " * * * he would not, by any reasonable stretch of the imagination, wait four weeks for plaintiff's financial statements, send plaintiff a new and superfluous ten day warning, wait another fifteen days, and then levy only on the bank accounts in Manhattan" (R. 2, p. 15a; Appendix B, *infra* p. 11a).

That is unwarranted and specious argument. Such circumstances obviously do not constitute a complete defense to the charge of malicious conduct. That court never would hold that the identical allegations by a defendant in his answer constituted a complete defense. Not only that, but the amended complaint contains allegations which, on this motion, the court was bound to assume would be proved and which, together with the evidence of malice already in the record, would give a jury unassailable grounds for a completely contrary conclusion. More specifically:

Of course respondent delayed seizing petitioner's account. He did not dare levy without permission of his supervisor. He could not get that permission for ten days because he obtained it by means of the falsehood that petitioner broke a promise to file statements within ten days. And sending what the court called "a new and superfluous ten day warning," * hardly is inconsistent with a plan of harassment. Threatening to seize property when the officer is not attempting to collect taxes and when he knows that his very threat will cause the account to be emptied, *is* harassment. And the reason why respondent sent that notice instead of seizing the account at once is easy to discover. Even respondent did not have the consummate effrontery to suggest a seizure the day the financial statements arrived. Remember respondent had just told his supervisor a false-

---

* He had sent the required statutory notice many months before (R. 1, p. 16a; Appendix B, *infra* p. 10a).

hood about petitioner and those statements. No doubt he had a slight twinge of conscience.

It is nothing short of amazing for the court to cite respondent's selection of Manhattan accounts for seizure as evidence of his good faith. The Manhattan accounts were solely petitioner's or joint accounts while the Queens accounts belonged solely to his wife (R. 1, p. 16a). Selecting petitioner's money and leaving his wife's untouched is more consistent with malice than the absence of it. It demonstrates an interest in petitioner and a disinterest in the collection of money.

The clincher is the suggestion that respondent was seriously expecting to find money in the account after he had loudly announced by what the court called "a new and superfluous ten day warning" that he was going to seize it ten days later. What stronger evidence do we need that respondent was not trying to collect taxes?

Even the authority cited by the Court of Appeals has no application. It cited 2 Moore's Federal Practice, 12.08 at 2245 (2 ed. 1964) which actually says:

> "But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proven in support of the claim.*" (Italics in the original.)

There are the most obvious questions of fact. Manifestly the court did not know and could not know what petitioner could offer in proof of malice. Depositions conceivably could uncover admissions or boasts of respondent as to what he did. The position taken by the court is utterly undefensible.

4. The writ should be granted because the District Court has extended the doctrine of *Barr* v. *Matteo, supra,* beyond anything apparently contemplated by this Court. The correctness of the District Court decision is the real issue here but the Court of Appeals avoided it after 7 months by the expedient of deciding the case on the "merits." The District Court's decision still stands as the law and it exceeds the scope of *Barr* v. *Matteo* in these respects:

a. The District Court has held in effect that it makes no difference whatever if respondent obtained his authority to levy by falsely stating to his supervisor that petitioner made and broke a promise to supply financial statements and that the supervisor revoked the authority when the statements arrived. Such evidence was before the District Court (T.R. pp. 172-190), but it was ignored completely. Nowhere did the court as much as refer to these highly important circumstances.

b. The amended complaint alleges facts constituting the crime of Willful Oppression (Internal Revenue Code, §7214) and further alleges that for the reason that respondent's conduct was criminal, he was completely without authority (R. 1, pp. 13a-23a).* The District Court disposed of that by saying that respondent could not be guilty of that crime unless he was without authority and that petitioner was engaged in circular reasoning (R. 1, p. 6a). That is no answer. The allegations do spell out the crime. *People* v. *Rudolph,* 303 N. Y. 73. In fact the allegations, since they include malice, go further than necessary for the reason that any excessive force under color of law con-

* This is alleged in detail in the Amended Complaint but not repeated here for the sake of brevity (R. 1, pp. 13a-27a).

stitutes oppression. *United States* v. *Deaver*, 14 F. 595. The Internal Revenue Code does not brand acts as criminal in one paragraph and authorize them in another. It is submitted that this poses a question which should be answered by this Court.

c. There is a serious question of whether respondent has any discretion regarding seizure of property. In fact, even if he was permitted some discretion it would seem that the crucial point would be whether he was *required* to exercise it or whether he could ask for instructions. The purpose of *Barr* v. *Matteo* seems to be to protect an official whose *legal duty* it is to exercise discretion, that is, a person to whom there are "matters committed by law to his control or supervision." In any event there is a genuine issue of fact here as to what if any discretion respondent had and the question of discretion is of vital importance.

The "Position Descriptions" hereinbefore referred to (R. 1, pp. 36a-40a; R. 2, pp. 1a-6a), covering Revenue Officers GS-9 and GS-12, raise obvious questions of fact as to the actual practice and routine of the bureau in fixing the responsibility for the issuing process. Petitioner requested permission to take depositions to find the answers but the Court denied the request and said:

> "• • • Moreover, the issue before the court at this time is one which can be determined upon affidavits and documents alone" (R. 1, p. 9a; Appendix B, *infra* p. 9a).

And the District Court disposed of the whole issue of authority by relying solely upon a revenue officer's authority "to sign their name on behalf of the District Director" on

notices of levy (R. 1, p. 10a; Appendix B, *infra* p. 20). It is submitted that that delegation of the power to sign, which by-passes all bureau chiefs and all supervisory personnel, is merely a practical device to permit the District Director to avoid the onerous chore of personally signing thousands of notices daily. It is no blanket surrender of his discretion to minor employees and it does not purport to be. That is evident from the official regulations which expressly provide that the supervisors control the agents (26 Fed. Reg. 6372-6395, par. 1118.8(2)) (Appendix A, *infra* p. 7a).

The District Court has held that it makes no difference what evidence of lack of authority there may be. Its decision rests squarely upon that formal delegation of permission to sign papers.

It is submitted that this case raises questions of great and general importance concerning the limits of the doctrine of *Barr* v. *Matteo*.

CONCLUSION

For the foregoing reasons this writ of certiorari should be granted.

Respectfully submitted,

GEORGE G. HUNTER, JR.
Petitioner Pro Se

APPENDIX A

Constitutional Provisions, Statutes and Regulations

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Seventh Amendment to the Constitution of the United States

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Constitution of the State of New York
Article I—Bill of Rights

§1 • • •

§2 [Trial by jury; how waived.]

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain invio-

late forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

THE INTERNAL REVENUE CODE (1954)

§6301. Collection authority.

The secretary or his delegate shall collect the taxes imposed by the internal revenue law.

§6331. Levy and distraint.

(a) AUTHORITY OF SECRETARY OR DELEGATE.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may

be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States, or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

§7214. Offenses by officers and employees of the United States.

(a) UNLAWFUL ACTS OF REVENUE OFFICERS OR AGENTS.—Any officer or employee of the United States acting in connection with any revenue law of the United States—

(1) who is guilty of any extortion or willful oppression under color of law

* * * * *

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sus-

tained in favor of the party injured, to be collected by execution.

NEW YORK PENAL LAW

§854. Extortion committed under color of official right.

A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority:

1. Arrests another, or detains him against his will; or,
2. Seizes or levies upon another's property; or,
3. Dispossesses another by any lands or tenements; or,
4. Does any other act, whereby another person is injured in his person, property, or rights,

Commits oppression and is guilty of a misdemeanor.

UNITED STATES TREASURY REGULATIONS (1954 Code)

§301.6331—1 Levy and distraint.

(a) AUTHORITY TO LEVY—(1) IN GENERAL. If any person liable to pay any tax neglects or refuses to pay such tax within 10 days after notice and demand, the district director to whom the assessment is charged or, upon his request, any other district director may proceed to collect the tax by levy upon any property, or rights to property, whether real or personal, tangible or intangible, belonging to such person or on which there is a lien provided by section 6321 or 6324 (or the corresponding provision of prior law) for the payment of such tax. As used in section 6331 and this section,

the term "tax" includes any interest, additional amount, addition to tax, or assessable penalty, together with any costs and expenses that may accrue in addition thereto. For exemption of certain property from levy, see section 6334 and the regulations thereunder. Property subject to a Federal tax lien, which has been sold or otherwise transferred by the taxpayer, may be seized in the hands of the transferee or of any subsequent transferee. Levy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property subject to levy, such as, for example, receivables, bank accounts, evidences of debt, securities, and accrued salaries, wages, commissions, and other compensation.

§301.7701—9 Secretary or his delegate.

(a) The term "Secretary or his delegate" means the Secretary of the Treasury, or any officer, employee, or agency of the Treasury Department duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform the function mentioned or described in the context, and the term "or his delegate" when used in connection with any other official of the United States shall be similarly construed.

* * * * *

(c) An officer or employee, including the Commissioner, authorized by regulations or Treasury decision to perform a function shall have authority to redelegate the performance of such function to any officer or employee performing services under his supervision and control, unless such power to so redelegate is prohibited or restricted by proper

order or directive. The Commissioner may also redelegate authority to perform such function to other officers or employees under his supervision and control and, to the extent he deems proper, may authorize further redelegation of such authority.

Statement of Organization and Functions of the Internal Revenue Service (26 Fed. Reg. 6372-6395 [1961]):[1]

1118 OFFICE OF DISTRICT DIRECTOR

1118.1 MISSION

The mission of the office of the District Director is to administer the internal revenue laws within an internal revenue district in conformance with Service policies and programs of the National and regional offices.

1118.2 BASIC ORGANIZATION

The principal organizational components of the typical district office are the immediate office of the District Director, the Audit Division, Collection Division, Intelligence Division and Administration Division.

* * * * *

1118.5 COLLECTION DIVISION

(1) The Collection Division is responsible for the receipt and processing of tax returns and related documents filed

[1] Also published in "Statement of Organization and Functions", Treasury Department Publication No. 383 (Rev. 7-62), and 6 CCH Fed. Tax Rep. 67,038 et seq.

with the district; the deposit of and accounting for tax remittances; making determinations with respect to tax refunds, credits, penalties, abatements or overassessments; maintaining prescribed accounting and ledger controls including control of the refund appropriation account; the performance of all collection activity as relates to the sale and accounting for revenue stamps; the collection of delinquent accounts through distraint, seizure, levy and other means and the securing of delinquent returns.

* * * * *

1118.8 LOCAL OFFICES

(1) Local offices perform one or more of certain collection, audit and intelligence functions such as: The collection of delinquent accounts and the securing of delinquent returns; the receiving and deposit of monies tendered in payment of taxes; the examination of returns to determine correct liability of taxpayers for tax and penalties; the holding of informal conferences with taxpayers and their representatives regarding the determination of liability for tax and penalties; and the investigation of alleged criminal violation of the tax statutes.

(2) The administrative supervision of a local office is the responsibility of a representative designated by the District Director from among the personnel assigned to the local office. Technical supervision of the personnel at a local office is the responsibility of the group supervisor or group supervisors of whatever group or groups the employees are members.

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

Opinion of United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 82—September Term, 1964.

(Argued October 16, 1964 Decided May 18, 1965.)

Docket No. 28915

GEORGE G. HUNTER, JR.,

Plaintiff-Appellant,

—v.—

FRANCIS S. TALBOT,

Defendant-Appellee.

Before:

WATERMAN, MOORE and SMITH,

Circuit Judges.

Appeal from order of the United States District Court for the Southern District of New York, Croake, *J.*, dismissing tort suit by taxpayer against revenue officer. Affirmed.

Opinion of the United States Court of Appeals

GEORGE G. HUNTER, JR., New York City, *Plaintiff-Appellant, pro se.*

EDWARD L. SMITH, Asst. U. S. Attorney (Robert M. Morgenthau, U. S. Attorney, Alan G. Blumberg, Asst. U. S. Attorney), *for Defendant-Appellee.*

PER CURIAM:

Plaintiff, a taxpayer, brought suit against defendant, a revenue officer for the Internal Revenue Service, in the Civil Court for New York County. In plaintiff's own words, "the gist of this action is the charge that defendant . . . seized a token balance of a bank account belonging to plaintiff, knowing that there was only a token balance, and acting solely for the purpose of harassing and injuring plaintiff without any idea whatever of collecting any tax." Upon petition by defendant, pursuant to 28 U. S. C. §1442, the suit was removed to the United States District Court for the Southern District of New York. After protracted legal scuffling between the parties, Judge Croake dismissed the action on the ground that defendant was immune from suit.

Stripped of all conclusory verbiage, plaintiff's amended complaint alleged the following facts: In May, 1962, plaintiff and his wife owed an overdue balance of $1911 plus interest on their 1960 federal income tax. Defendant telephoned plaintiff to inquire about payment of the balance. Plaintiff said that although he was short of funds at the moment, he would be able to pay at least $1,000 by October.

Defendant replied that this proposal sounded "fine" but that he would need financial statements from plaintiff and his wife before payment could be deferred. After expressing his objections, plaintiff agreed to submit the statements within thirty days. When defendant noted that the statements would have to be filed within ten days, plaintiff rebuked him, rejected the demand, and hung up.

Four weeks later, plaintiff filed the required statements for himself and his wife. These statements revealed that plaintiff and his wife had accounts in a Manhattan bank, and that his wife also had accounts in two Queens banks; the deposits totaled almost $1500. The statements also showed that his wife was employed in a hospital in Manhattan.

Three days later, defendant sent plaintiff and his wife a notice pursuant to 26 U. S. C. §6331, informing them that if they did not pay the balance of their taxes in ten days, the government would levy on their property and sources of income. The government had sent plaintiff and his wife a similar notice in December, 1961.

After waiting fifteen days, defendant served a writ of levy on the Manhattan bank in which plaintiff had his business checking accounts. The body of the accounts had meanwhile been withdrawn by plaintiff and his wife, so that the levy eventually netted only $29.71. Defendant made no further attempt to levy on the wife's bank accounts in Queens, which had also been decimated, or on the wife's hospital salary.

These allegations by plaintiff belie the theory of his suit against defendant. If defendant was bent on "harassing

and injuring" plaintiff, he would not, by any reasonable stretch of the imagination, wait four weeks for plaintiff's financial statements, send plaintiff a new and superfluous ten-day warning, wait another fifteen days, and then levy only on the bank accounts in Manhattan. To our knowledge, there being no other theory on which the suit could be based, we hold that plaintiff's claim was "clearly without any merit" and was properly dismissed. 2 Moore, Federal Practice ¶12.08, at 2245 (2 ed. 1964). We need not reach defendant's alternative argument that he was immune from suit, within the principles of *Barr* v. *Matteo*, 360 U. S. 564 (1959), and like cases.

Affirmed.

Judgment of United States Court of Appeals, Second Circuit, Appealed From

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of May, one thousand nine hundred and sixty-five.

Present:

HON. STERRY P. WATERMAN,
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,

Circuit Judges.

GEORGE G. HUNTER, JR.,

Plaintiff-Appellant,

—v.—

FRANCIS S. TALBOT,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

—29—

Memorandum Opinion Dated June 27, 1963

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63-Civ. 1207

[SAME TITLE]

CROAKE, *District Judge*

MEMORANDUM

The defendant, FRANCIS S. TALBOT, brings this motion for an order dismissing the complaint, and for such other and further relief as may seem just and proper. The defendant is employed by the Internal Revenue Service as a Revenue Officer, and the plaintiff, a lawyer appearing *pro se,* in this tort action seeks damages of $10,000, claiming that the defendant levied against his bank account simply to harass him rather than for the statutory purpose of collecting taxes.

There is no doubt but that the plaintiff may have been provoked by the fact that steps were being taken to collect tax arrears which were admittedly owed by him. However,

—30—

the methods pursued by defendant in his official capacity were well within the law and within the scope of official authority. Necessarily, there are times when a delinquent taxpayer may believe he has been singled out by an officer of the United States as a victim of undue pressure or improper efforts to collect the taxes which he owes. While such a belief is understandable, such is not the case. The necessity for the collection of the taxes is so obvious it does not need any particular comment, as it follows that Congress

vested the service with authority to devise methods to best accomplish the desired results, although the taxpayer may be in disagreement with those methods.

Government officials should be immune from tort liability for actions taken in the exercise of their official responsibilities, except in the most unusual cases. This is not such a case. *Barr* v. *Matteo,* 360 U. S. 564 (1959).

After argument and submission of this motion, plaintiff calls attention by letter to the recent decision of the Supreme Court in *Wheeldin* v. *Wheeler,* —— U. S. —— (No. 493-Oct. 1962 Term, decided June 3, 1963), which distinguishes the *Barr* case on the ground of an allegation of lack of authority. While it is true that the instant complaint

does make such an allegation, it does so in a completely conclusory manner. The complaint on its face and the tax laws of which this court takes judicial notice show that defendant was acting within the scope of his authority. The only allegations in support of the conclusion of lack of authority are ones involving the intent, motive or other state of mind of defendant. The *Barr* case holds such allegations are insufficient. Nevertheless, since plaintiff has alleged lack of authority, if he is so advised he may have thirty days from the filing of this memorandum within which to file an amended complaint which shall allege such facts as will spell out a sufficient basis for said conclusion. Otherwise, the relief sought by the defendant will be granted.

Submit order.

Dated: New York, N. Y.
June 27, 1963

THOMAS F. CROAKE
U. S. D. J.

—86—

Memorandum Opinion Dated October 1, 1963

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 1207

[SAME TITLE]

CROAKE, *District Judge*

MEMORANDUM

By order of this court[1] filed July 18, 1963, the complaint herein was dismissed with leave to amend. Plaintiff has filed an amended complaint and defendant has again moved to dismiss. Plaintiff has moved to reargue the prior motion to dismiss. The motions will be considered together.

Defendant is employed by the Internal Revenue Service as a revenue officer. Plaintiff seeks damages against him, claiming that he levied against a bank account belonging to plaintiff solely for the purpose of harassing plaintiff.

—87—

The original complaint was dismissed under the authority of *Barr* v. *Matteo*, 360 U. S. 564 (1959) on the ground that a Government official is immune for tort liability on account of any act done in the exercise of his duties. However, because of the case of *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963), which held that any such official acting without authority was not immune from tort liability, plaintiff was

[1] See also the memorandum of the court dated June 27, 1963.

given leave to amend his complaint in order to spell out his claim that defendant was so acting.

The only new point raised by plaintiff on his motion to reargue is his citation of 26 U. S. C. 7214 which, among other things, makes it a crime for any revenue officer to be guilty of "wilful oppression under color of law." He argues that since he has now alleged that defendant is guilty of "wilful oppression," such allegation is tantamount to an allegation that defendant has committed a criminal act and, hence, lacked authority to perform such act. However, since the phrase "color of law" means "appearance or semblance, without the substance, of legal right" (Black's Law Dictionary, 4th Ed. 1951, page 331), defendant could not have

been guilty of said crime unless he was then acting without authority. Thus, the reasoning of plaintiff is circular and, therefore, does not convince the court that the decision be changed. Accordingly, this argument must be rejected and the court, on reconsideration of its original decision, adheres thereto.

Although the amended complaint does little to spell out the alleged lack of authority and might, therefore, be dismissed under Rule 12(c), Federal Rules of Civil Procedure, for failure to state a claim, this court is reluctant to take such action where there is a possibility that the amended complaint may be more liberally construed. While paragraph 22 of that complaint, taken as a whole, appears to allege that the acts of defendant were unauthorized because they were "oppressive" (which theory this court rejected in its prior decision), there also is the possible implication that

authority had not been duly delegated to defendant. The Federal Tax Regulations make it clear that district directors are empowered to make levies,[2] and that they may sub-

—89—

delegate such power.[3] The court, however, has found no regulation or rule of which it can take judicial notice in deciding whether such authority was, in fact, subdelegated to defendant.

Since defendant does assert that he was authorized, and since his assertion is a matter outside of the complaint, the court, pursuant to Rule 12(c), will treat the motion to dismiss the complaint as one for summary judgment. Consideration of the motion will be confined to the question of whether the aforesaid authority was subdelegated to defendant. The parties may submit pertinent affidavits and documents on or before October 18, 1963.

So Ordered.

Dated: New York, New York
October 1, 1963

Thomas F. Croake
U. S. D. J.

---

[2] 26 CFR 301.6331-1.

[3] 26 CFR 301.7701-9.

—156—

Memorandum Opinion Dated October 25, 1963

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 1207

[SAME TITLE]

CROAKE, *District Judge*

MEMORANDUM

There are two branches to the instant application made by plaintiff. The first is for further time to submit affidavits upon the motion which the court has elected to treat as one for summary judgment. The second is for permission to take depositions for the purposes of said motion.

The only issue to be decided on the motion is whether authority was delegated to defendant by the District Director of Internal Revenue to perform acts which the plaintiff alleges were done in an improper manner and upon which he bases this action. (See memorandum of the Court dated October 1, 1963.) Defendant has already submitted

—157—

documents for the purpose of showing that there was such a delegation of authority, but has not submitted an affidavit or proof of service of copies of the documents upon plaintiff. This should be done. The plaintiff, if he is so advised, may have thirty days after the filing of the affidavit of defendant within which to submit his papers.

Memorandum Opinion Dated October 25, 1963

That branch of the application seeking permission to take depositions is denied. The decision of the Hon. Frederick vP. Bryan, United States District Judge, referred to by plaintiff, is not dispositive as to the depositions. At this stage of the proceedings, the court has elected, pursuant to Rule 12, Federal Rules of Civil Procedure, to treat the motion as one for summary judgment, where as previously it was the defendant who had so moved. Hence, the case is now in a different posture. Moreover, the issue before the court at this time is one which can be determined upon affidavits and documents alone.

So Ordered.

Dated: New York, N. Y.
October 25, 1963

Thomas F. Croake
U. S. D. J.

—148—

Memorandum Opinion Dated February 7, 1964

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63-Civ. 1207

[SAME TITLE]

CROAKE, *District Judge*

MEMORANDUM

The only issue presented to this court by the motion of the defendant for summary judgment is whether defendant, an Internal Revenue Agent, had sufficient authority to levy on certain bank accounts in which plaintiff had an interest (see memoranda of the court dated June 27, October 1 and October 25, 1963).

Defendant has produced Internal Revenue Service documents showing a chain of delegation of authority commencing with that of Kenneth W. Moe, then District Director of Internal Revenue for the District of Manhattan, to the defendant purporting to authorize defendant to make such levies. Plaintiff does not challenge the authenticity of these

—149—

documents, but merely questions their effect. The court is satisfied that they establish the requisite authority. The other contentions made by plaintiff have been disposed of upon prior applications. Accordingly, defendant is entitled

to summary judgment in conformity with the principles set forth in *Barr* v. *Matteo*, 360 U. S. 564 (1959), and *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963).

Settle judgment.

Dated: New York, N. Y.
February 7, 1964

THOMAS F. CROAKE
U. S. D. J.

Judgment of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This Court having rendered memoranda opinions dated June 27, 1963; October 1, 1963; October 25, 1963; and February 7, 1964, it is hereby

ORDERED, ADJUDGED and DECREED that the complaint and amended complaint be dismissed with prejudice and with costs to the defendant in the amount of $20.

Dated: New York, N. Y.
March 3, 1964

THOMAS F. CROAKE
U. S. D. J.

Judgment entered: 3/4/64

James E. Valeche
Clerk